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## RE CHEN KOK ON

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
AMELATI PARNELL JC
[ORIGNATING SUMMONS NO: BKI-25-12-4-2022]
17 AUGUST 2022

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**Abstract** – *A judicial review application is initiated on the premise that a party is aggrieved by a decision of a public authority. In that premise, having known exactly the party to be named as the respondent, the failure to state the name of the respondent in the application under O. 53 r. 3 of the Rules of Court 2012 in the nature of Form 109, renders the application fundamentally flawed and defective.*

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***CIVIL PROCEDURE:*** *Judicial review – Leave – Application for – Procedure under O. 53 r. 3 of Rules of Court 2012 – Whether Form 109 to be used – Failure to state name of respondent in nature of Form 109 – Whether rendered application fundamentally defective – Whether O. 1A could be invoked – Whether time limit for application to be strictly observed – Whether failure to apply within time limit fatal – Whether cogent reasons given for delay – Whether application against final ruling – Whether application premature*

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***CIVIL PROCEDURE:*** *Locus standi – Judicial review – Federal Attorney General ('AG') – Right to appear – Application for leave stage – Whether Federal AG entitled as of right to appear in any judicial review application – Whether appeared in capacity as AG*

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The applicant appeared for the plaintiffs in the originating summons No SDK-24NCvC-16-7-2020 ('OS') as there were no solicitors on record. In explaining his *locus*, the applicant stated that the fourth plaintiff was his brother-in-law and he was helping on a *pro-bono* basis. In doing so, the applicant, who was neither a partner nor a legal assistant at the firm, did not go through his legal firm as there existed a 'commercial agreement' between the applicant and the firm that the applicant may act on freelance basis. The presiding judge contended that the applicant had acted in an improper manner and had no *locus* to represent the plaintiffs. After some altercations between the presiding judge and the applicant, the applicant finally withdrew himself from representing the plaintiffs. The OS was subsequently withdrawn by the plaintiffs and the court proceeded to strike out the OS with liberty for the plaintiffs to file it afresh. Following this incident, a Senior Assistant Registrar of Sandakan High Court ('SAR') made an official complaint to the Sabah Advocates Disciplinary Board ('DB') on the possible misconduct of the applicant. During the disciplinary hearing and at the end of the complainant's case on 8 December 2021, the DB made a ruling that the complainant had adduced sufficient evidence to prove the allegation of misconduct by the applicant and the applicant's submission of no case to

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answer was dismissed. The DB then issued a letter dated 23 December 2021 informing the applicant that he was required to file his defence and a hearing date was fixed. The applicant thus filed *ex parte* leave application under O. 53 r. 3 of the Rules of Court 2012 ('ROC') to commence a judicial review application against the DB. The application for leave was opposed by the Federal Attorney General ('Federal AG') on the grounds that (i) no respondent was named in Form 109; (ii) the DB's decision on 8 December 2021 was not a final decision; and (iii) the leave application was filed out of time. The DB had also raised similar preliminary issues.

**Held (dismissing application for leave to commence judicial review with costs):**

**(1)** By virtue of O. 53 r. 3(3) of the ROC, the Federal AG is entitled as of right to appear in any judicial review application before the court. The Senior Federal Counsel ('SFC') appears in the capacity as the AG and not for the respondent as yet at this leave stage. During the mention date, the SFC had indicated that he will be filing their written submission objecting to the application for leave. Whereas, for the DB, the applicant's own prayer in the OS was for leave to commence a judicial review application against the DB and hence, DB had the *locus standi* to appear. Hence, there was no prejudice caused to the applicant. (paras 14-17 & 52)

**(2)** Form 109 is to be used in leave application for judicial review. Failing to state the name of the respondent(s) in the originating application in the nature of Form 109 would be fatal and therefore, the OS was fundamentally defective. Further, the general provision of O. 1A of the ROC could not be invoked when the applicant disregarded Form 109 of O. 53 in failing to state the name of the respondent(s) in the originating application for leave. (paras 25-27)

**(3)** An application for judicial review shall be made promptly, within three months from the date of the decision, as prescribed by O. 53 r. 3(6) of the ROC. The word 'shall' in O. 53 r. 3(6) is to be observed strictly. The applicant's submission that under the well-established principle of judicial review: (i) there is no time limit to apply for a declaration that a decision of an inferior tribunal is null and void; (ii) there is no time limit to apply to quash a decision of an inferior tribunal for being null and void; and (iii) even if there had been a delay, this court had the discretion to grant extension of time, and there were good reasons for such extension of time to be granted, was bound to fail as the fact of the matter was that the three-month deadline had expired. The failure to apply within the time limit was fatal. As there was no cogent reason given for the delay, the application for leave ought to be dismissed. (paras 29, 33, 35 & 38)

**(4)** The applicant, despite submitting that the ruling by the Board could not be disregarded unless it was set aside, had chosen to appeal against the DB ruling in OS 13/1 instead of filing for judicial review. The court took judicial notice of the proceedings wherein the applicant had taken the position in the earlier OS that there were merits in the appeal and would like to maintain the appeal. The relief sought by the applicant in the earlier OS 13/1 and in the present OS was identical in effect, *ie*, setting aside the decision of the DB dated 18 December 2021, and hence, amounted to duplicity of proceedings and was an abuse of judicial process. (paras 43-45, 51 & 59)

**Case(s) referred to:**

*DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor [2019] 3 CLJ 593 CA* ***(refd)***

*Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC* ***(dist)***

*Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA* ***(refd)***

*Nazaruddin Mohd Shariff & Anor v. Roslan Maulud & Anor [2020] 1 LNS 1235 HC* ***(foll)***

*Omar Suhaimi Abu Hassan v. Mahkamah Perusahaan Malaysia & Anor [2014] 3 CLJ 720 CA* ***(refd)***

*Ong Keh Keong v. Lembaga Tatatertib Peguam-Peguam [2020] 10 CLJ 181 CA* ***(refd)***

*Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang [2016] 4 CLJ 100 CA* ***(refd)***

*Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC* ***(foll)***

*Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC* ***(refd)***

*Yahya Kassim v. Kerajaan Malaysia & Anor [1998] 1 CLJ 43 CA* ***(refd)***

**Legislation referred to:**

National Land Code, s. 263(1)

Rules of Court 2012, O. 1A, O. 53 rr. 1(1), 2(1), 3(1), (2), (3), (6)

Rules of the High Court 1980, O. 53

*For the applicant - In person*

*For the AGC - Mohd Hafizi Abd Halim; SFC*

*For the Disciplinary Board - Alvin Leong; M/s Leong & Wong Advocs*

*Reported by S Barathi*

## JUDGMENT

**Amelati Parnell JC:**

### Introduction

**[1]** This is an application under O. 53 r. 3 of the Rules of Court 2012 ('ROC') by the applicant for the following orders:

(i) that leave be granted to the applicant to commence a judicial review application against the Sabah Advocates Disciplinary Board, for the following reliefs:

(a) a declaration that the purported ruling dated 8 December 2021 by the Sabah Advocates Disciplinary Board made in Complaint No. DB.2020.91 ('the purported ruling') is null and void and of no effect;

(b) an order of *certiorari* to quash the purported ruling;

(c) a declaration that there is no case for the applicant to answer in the Sabah Advocates Disciplinary Board made in Complaint No. DB.2020.91;

(d) an order for the Sabah Advocates Disciplinary Board to dismiss Complaint No. DB.2020.91 against the applicant; and/or

(e) such further and/or other relief deemed fit and appropriate.

(ii) alternatively, and if deemed necessary by this court, an extension of time be given to the applicant, until the date of filing of this application, to apply for leave to commence the aforesaid application for judicial review.

**[2]** On 19 May 2022, this court was informed that the cause papers were served on to the Federal AG ('AGC') and the Sabah Advocates Disciplinary Board. In addition, the applicant has also served the cause papers on the State AG on 21 April 2022 and the complainant herself in the disciplinary proceedings Puan Marilyn Kelvin, at the Sandakan High Court on 27 April 2022.

**[3]** Learned Senior Federal Counsel Sabah appears in the capacity as the AG and not for the respondent as yet at this leave stage.

**[4]** The Sabah Advocates Disciplinary Board is represented by Mr Alvin Leong.

**[5]** The application for leave were opposed by the AGC as well as the Sabah Advocates Disciplinary Board.

**Cause Papers**

**[6]** The following documents filed herein:

(i) the applicant's originating summons (encl. 1) ('the leave application');

(ii) statement (O. 53 r. 3(2)) dated 18 April 2022 (encl. 2) ('the statement');

(iii) the affidavit-in-support affirmed by Chen Kok On dated 18 April 2022 ('the AIS');

(iv) affidavit in opposition of Fong Tet Wun, the Secretary of the Sabah Advocates Disciplinary Board affirmed on 29 April 2022 ('the AIO'); and

(v) affidavit No. 2 affirmed by Chen Kok On dated 12 May 2022 ('the AIR').

A **Salient Facts**

**[7]** On 4 August 2021 the applicant appeared before the presiding judge in the High Court of Sandakan. The applicant appeared for the litigant plaintiffs in the Originating Summons No. SDK-24NCvC-16-7-2020 ('the OS') as there were no solicitors on record.

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**[8]** When asked by the court to explain his *locus* for the plaintiffs, the applicant purported to justify his appearance by stating the following:

(i) that the fourth plaintiff is his brother in law;

(ii) that the applicant is merely helping the plaintiffs on *pro bono* basis;

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(iii) that in doing so, the applicant is not going through his legal firm Messrs JPKeruak as there exists a "commercial arrangement" between the applicant and Messrs JPKeruak which the applicant may act on freelance basis; and

D (iv) that the applicant is neither a partner nor a legal assistant at Messrs JPKeruak.

**[9]** The presiding judge contended that the applicant had acted in an improper manner and had no *locus* to represent the plaintiffs in the said OS. After some altercations between the presiding judge and the applicant, the

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applicant finally withdrew himself from representing the plaintiffs. Then immediately one of the litigant plaintiffs appeared in person before the presiding judge and informed the court that he is withdrawing the OS application and intends to re-file the matter. The court proceeded to struck out the OS with liberty for the plaintiffs to file it afresh.

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**[10]** Following the above incident, a Senior Assistant Registrar of Sandakan High Court, Puan Merilyn Kelvin ('the SAR') made an official complaint to the Sabah Advocates Disciplinary Board ('the DB') on the possible misconduct of the applicant. The complaint was registered under Complaint No. DB.2020.91.

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**[11]** During the disciplinary hearing and at the end of complainant's case, on 8 December 2021 the DB made a ruling that the complainant had adduced evidence sufficient to prove the allegation of misconduct by the respondent Chen Kok On and that the respondent's submission of no case to answer was dismissed.

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**[12]** The DB then issued a letter dated 23 December 2021 informing the respondent Chen Kok On that he is required to file his defence and a hearing date was fixed.

**[13]** The respondent/applicant filed an *ex parte* leave application for judicial review before this court on 18 April 2022.

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**Preliminary Issues**

*Whether The Federal AG Have Locus Standi To Appear?*

**[14]** By virtue of O. 53 r. 3(3) of the ROC, the AGC is entitled as of right to appear in any judicial review application before the court. The AGC appears in the capacity as the AG and not for the respondent as yet at this leave stage.

**[15]** Order 53 r. 3(3) of the ROC provides:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

**[16]** No prejudice caused to the applicant as on the mention date 19 May 2022, learned SFC appearing before this court had indicated that he will be filing their written submission objecting to the application for leave.

**[17]** As for the DB, objection was raised under the heading preliminary issues *via* the filing of AIO. The applicant's own prayer (a) in the OS is for leave to "commence a judicial review application against the Sabah Advocates Disciplinary Board" and hence DB do have the *locus standi* to appear.

**[18]** Issues raised by AGC and Disciplinary Board is similar in that no respondent being named as required in Form 109 and leave application filed out of time as prescribed in O. 53 r. 3(6) of the ROC 2012.

**Grounds Of Objection**

**[19]** The grounds of objection by AGC in objecting the applicant's leave application are that:

(i) no respondent being named;

(ii) the decision of the DB on 8 December 2021 is not a final decision;

(iii) the leave application was filed out of time.

**[20]** The DB, has also raised similar preliminary issued in the AIO, namely, failure to name the respondents, filed out of time and duplicity of proceedings.

**Analysis And Findings**

*No Respondent Being Named*

**[21]** Learned SFC submits that:

(i) a judicial review application is initiated on the premise that a party is aggrieved by a decision of a public authority. In this case, despite believing that he (the applicant) is aggrieved by the DB's decision, the applicant failed to name the DB as the respondent. The applicant' OS

mentioned the Sabah Advocates Disciplinary Board in its prayer for an order (among others) that the DB's ruling on 8 December 2022 be declared as null and void and of no effect;

(ii) it is plain and obvious that the applicant's leave application filed herein was none other than to highlight that the applicant was affected by the DB's ruling. Ironically, the applicant did not name the Sabah Advocates Disciplinary Board as the respondent;

(iii) pursuant to O. 53 r. 2 of the Rules of Court 2012 and in particular Form 109 requires to state the name of the respondent;

(iv) the applicant is not satisfied with the decision of a specific party, not any random unknown person/party. The applicant knows exactly and for certain of the said party and therefore the said party should be named as the respondent; and

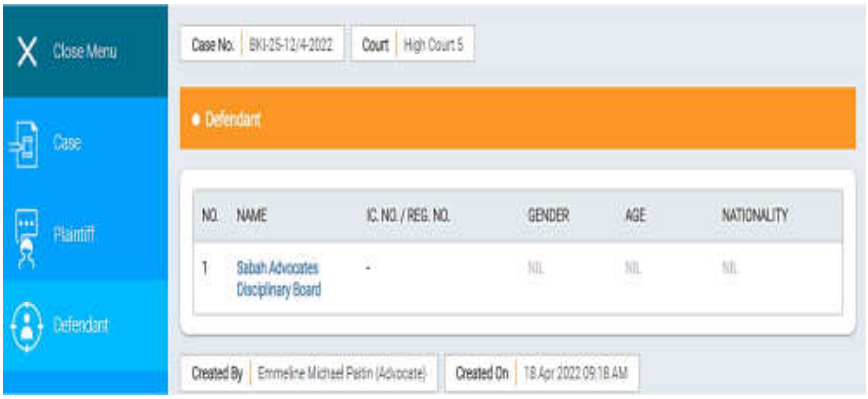
(v) the AGC strongly avers that the failure of the applicant to name the respondent in this matter renders this leave application fundamentally flawed and defective.

**[22]** As to the DB, it was submitted that:

(i) a glance at the OS will show that the applicant has quite uniquely chosen not to name any respondents. When this was pointed out by the DB in its AIO, the applicant has doubled down and insisted that "according to the rules, there is no requirement for the respondent to be named in this application";

(ii) unfortunately for the applicant, Form 109 of the Rules of Court 2012 says otherwise;

(iii) the applicant's own prayer (a) in the OS is for leave to "commence a judicial review application against the Sabah Advocates Disciplinary Board". From the records in CMS, this Honourable Court may take judicial notice of that fact that the applicant has added a sole "defendant" *ie*, the "Sabah Advocates Disciplinary Board", as follows:


Close Menu
Case
Plaintiff
Defendant
Case No. BKI-25-12/4-2022
Court High Court 5
Defendant
NO. NAME IC NO. / REG. NO. GENDER AGE NATIONALITY
1 Sabah Advocates Disciplinary Board - NIL NIL NIL
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(iv) although he has failed to properly name the DB as a respondent in the OS, his prayer and filing in CMS does at least mention the "Sabah Advocates Disciplinary Board". He has however entirely omitted to name the actual complainant, *ie*, the Sandakan High Court; and

(v) the complainant is obviously a party affected by the decision of the DB and the decision of this Honourable Court in the present matter, but is not named. The DB consequently avers that the OS is fundamentally defective as it fails to name any respondents, and even if it does (indirectly, *via* prayers and the applicant's filing in CMS) it fails to name the party most directly affected *ie*, the complainant.

**[23]** The applicant on the other hand submits that:

36. Both the Federal AG and the Board have objected to this application on the ground that no respondent has been named. Both of them relied on Form 109 to mount this misguided argument (see encl. 11 para. 15, encl. 7 para. 4). Unfortunately, this is a serious misinterpretation of the Rules.

37. Form 109 is the form required to be used by O. 53 r. 2(1): "An application for any of the reliefs specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 109."

38. Clearly, this Form 109 must be used when applying for judicial review reliefs. However, this application is not for judicial review, but for leave to apply for judicial review, which is governed by a different provision: O. 53 r. 3.

39. Indeed, the heading of Form 109 itself specified that it is to be used under O. 53 r. 2, (see encl. 7 para. 4, which has very helpfully reproduced Form 109 for our easy reference). It is not for an application made under O. 53 r. 3.

40. Further, O. 53 r. 3(1) expressly provides: "An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule."

41. In other words, application for leave must be made under O. 53 r. 3, and there is no form prescribed for an application under O. 53 r. 3. Clearly, an application for leave cannot be made under O. 53 r. 2, and therefore Form 109 cannot be used for an O. 53 r. 3 application, like the present application.

42. Indeed, O. 53 r. 3(1) expressly prohibits any application under O. 53 r. 2, before leave is granted under O. 53 r. 3(1). It follows that by implication, O. 53 r. 3(1) also prohibits the use of Form 109 in this application, which is not a judicial review application but an

application for leave to commence judicial review. Hence, to use Form 109 for this application would have been an abuse of process, not the other way round.

43. Therefore, both of the Federal AG and the Board have been seriously misguided in raising this objection.

44. Further, the applicant has not named any respondent to this application because O. 53 r. 3(2) expressly states that this application for leave must be made *ex parte*: "An application for leave must be made *ex parte* to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

45. Can the applicant name any respondent at all, if the application must be made *ex parte*? Obviously not. Further, O. 53 r. 3 does not say that any respondent must be named.

46. In any event:

(a) Note that both the Board and the complainant have been served with a copy of this application; and

(b) The applicant shall rely on O. 1A, as well as O. 2 r. 1(1), which states: "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been noncompliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."

47. In the premises, this objection is also misguided, by confusing O. 53 r. 2 with O. 53 r. 3.

**[24]** With regard to Form 109, this court will rely on the Court of Appeal case of *Omar Suhaimi Abu Hassan v. Mahkamah Perusahaan Malaysia & Anor* [2014] 3 CLJ 720, where it was stated by Hamid Sultan Abu Backer JCA (as he then was), in the following passages:

11. (vi) **In our view failing to seek a prayer for leave in the originating application in the nature of Form 109 will be fatal** unless the applicant has filed an application to amend the originating process for inadvertence within the three months (or extended) period specified in O. 53 r. 3(6) of the Rules of Court 2012 …

12. In the instant case **Form 109** is the originating process as reflected by O. 53 r. 2(1) of the Rules of Court 2012 **which, read together with O. 53 r. 3(1) and (2) of the Rules of Court 2012, is to be made *ex parte* to a judge in chambers.** … (emphasis added)

**[25]** Therefore, by virtue of the above case authority, there are merits in the objection raised whereby Form 109 is applicable for application for leave where the applicant requires to state the name of the respondent(s). Failing to state the name of the respondent(s) in the originating application in the nature of Form 109 will be fatal.

**[26]** Counsel for the applicant has failed to appreciate that Form 109 is to be used in making the leave application for judicial review. The OS is fundamentally defective as it fails to name any respondent(s).

**[27]** A general provision such as O. 1A of the Rules of Court 2012 must not supersede a mandatory requirement of the Rules. Order 1A cannot be invoked when the applicant disregards Form 109 of O. 53 in failure to state the name of the respondent(s) in the originating application for leave.

*The Leave Application Was Filed Out Of Time*

**[28]** Learned SFC submits that, as claimed by the applicant, the purported "ruling" made by the DB was on 8 December 2021. The applicant filed this *ex parte* application for leave for judicial review on 18 April 2022 which is more than four months from 8 December 2021.

**[29]** Pursuant to O. 53 r. 3(6) of the ROC 2012, the application must be filed promptly within three months from the date of the decision.

**[30]** Learned SFC relied on the case of *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161, where it was decided that the court has no jurisdiction to hear the leave application which was filed out of time.

**[31]** Further reference is made to Court of Appeal decision in *DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor* [2019] 3 CLJ 593 at p. 601:

> [43] There was no doubt that the appellant was bound by the terms of O. 53 r. 3(6) of the ROC and by the said terms his application was verily out of time. Therefore, the learned JC had no jurisdiction to hear the judicial review application by the appellant. In our view, the learned JC had correctly sustained the respondents' preliminary objection and his consequential order of dismissing the appellant's application *in limine*.

**[32]** On the part of DB, it was submitted that this is not merely a technical objection but is necessary in order for this court to have jurisdiction to hear the matter in the first place. The Court of Appeal in *Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang* [2016] 4 CLJ 100; [2016] 2 MLJ 225 stated quite simply at para. [71]:

> It is trite that the High Court had no jurisdiction to entertain applications for judicial review if they fail to comply with the 40-day time limit. Thus, compliance with the time frame prescribed by the rules is fundamental as it goes jurisdiction.

The 40-day time limit referred to above was prescribed under the earlier Rules of the High Court 1980, but the principle as to jurisdiction remains.

**[33]** First and foremost, it is trite law that an application for judicial review shall be made promptly, within three months, as prescribed by O. 53 r. 3(6) of the ROC 2012, which makes the three-month deadline a mandatory requirement. Therefore, the applicant's submission that under the well-established principles of judicial review:

(i) there is no time limit to apply for a declaration that a decision of an inferior tribunal is null and void;

(ii) there is no time limit to apply to quash a decision of an inferior tribunal for being null and void; and

(iii) even if (not conceded) there has been a delay, this court has the discretion to grant extension of time, and there are good reasons for such extension of time to be granted,

with respect, is bound to fail as the fact of the matter is that the three-month deadline had expired as prescribed by O. 53 r. 3(6) of the ROC 2012. The failure to apply within the time limit was, therefore, fatal, as explained in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* (*supr*a); *DKLS Sunshine Sdn Bhd v Kerajaan Negeri Pulau Pinang & Anor* (*supra*); *Seruan Gemilang Makmur Sdn Bhd v. Pegawai Kewangan Negeri Pahang* (*supr*a); see also *Yahya Kassim v. Kerajaan Malaysia & Anor* [1998] 1 CLJ 43.

**[34]** The case of *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21, [1982] 2 MLJ 37 referred to by the appellant is to be distinguished as it involved power under the National Land Code for a Collector to cancel an order for sale made under s. 263(1). Being a suit for declaration it was held that it is not subject to any time limit. Whereas the matter in the present case is for leave be granted to the applicant to commence a judicial review under O. 53 of the ROC 2012.

**[35]** The leave application was clearly filed out of time as prescribed under O. 53 r. 3(6) of the ROC 2012. This court is of the view the word "shall" in O. 53 r. 3(6) is to be observed strictly.

**[36]** The reasons stated at paras. 41-44 of the affidavit in support (encl. 3) to the OS leave for judicial review (encl. 1) is just an "alternative and if necessary", as deposed under the heading "Extension of Time for Leave (Alternative and if Necessary)". Even if the reasons to be considered, it is this court view that the alleged contentions that "the decision of DB is *ultra vires* decision which is null and void and ineffective", is not a ground for the delay but instead should prompt the applicant to file the leave for judicial review within time as stipulate under O. 53 r. 3(6) of the ROC 2012. Furthermore, the applicant had received the notes of proceedings from the DB on 31 December 2021 but admitted at that time, the applicant did not

make a note of the expiry date of the appointment of the Chairman of the Board was on 11 December 2021. Despite receiving the notes of proceeding on 31 December 2021, this application for leave for judicial review was only filed on 18 April 2022 which is more than three months and out of time as prescribed under O. 53 r. 3(6) of the ROC 2012. The reason that the applicant did not make any notes upon receiving the notes of proceedings cannot be used as a reason for the delay.

**[37]** The Court of Appeal in the case of *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123, it was stated by Justice Zaleha Zahari JCA (as she then was) that **"compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction."** Thus the need for rigid adherence to the express dictates of O. 53 of the Rules of the High Court 1980. (emphasis added)

**[38]** As there was no cogent reason given for the delay, the application for leave ought to be dismissed based on this factor alone.

*The Decision Of The DB On 8 December 2021 Is Not A Final Decision And Duplicity Of Proceeding And Abuse Of Court Process*

**[39]** Learned SFC submitted that the ruling made by the DB on 8 December 2021 is in relation to the applicant's "no case to answer". There is no finality in the said ruling nor was it decisive. The applicant/respondent has yet to answer to the complaints.

**[40]** In support, reference is made to the case of case of *Ong Keh Keong v. Lembaga Tatatertib Peguam-Peguam* [2020] 10 CLJ 181 where Hanipah Farikullah JCA held that:

> [59] We do not think that the Disciplinary Board's action on 14 November 2010, informing the applicant, can be properly characterised as a "decision" within the meaning of s. 103D of the LPA 1976. What was involved was not a decision which was final. A decision to affirm the finding on liability but disagreeing with the punishment recommended by the Disciplinary Committee to be imposed on the application in our view is not a "decision". Furthermore, it must be emphasised that the Disciplinary Committee's decision is not binding on the Disciplinary Board.

**[41]** Hence, learned SFC submits that the applicant's application herein is premature, similar to the case of *Ong Keh Keong* (*supra*). The DB's ruling for the applicant to answer the complaints made against him is just a fragmentation of decision that does not dispose the whole matter. It is not amenable to judicial review and an abuse of the court process.

**[42]** The applicant submits that *Ong Keh Keon*g case is distinguishable from the present case:

(i) That case was decided under the Legal Profession Act 1976, which is a different statute altogether from the Sabah Advocates Ordinance. That case was clearly based on the specific structure of the Legal Profession Act 1976.

(ii) Under the Sabah Advocates Ordinance, there is only one single body, which is the Board; whereas the Legal Profession Act 1976, there are two bodies (the Disciplinary Committee and the Disciplinary Board).

(iii) The ruling in the present case (if not set aside) is binding on the Board, whereas the decision in the *Ong Keh Keong* case was not:

> [59] … Furthermore, it must be emphasised that the Disciplinary Committee's decision is not binding on the Disciplinary Board.

**[43]** The applicant submits that the applicant is not free to disregard the ruling by the Board, unless it is set aside. Therefore, it cannot be disputed that the applicant is a person who is adversely affected by the ruling and is therefore entitled to make this application.

**[44]** Despite the above averment, the applicant had at the first instant chose to appeal against the DB's ruling in Kota Kinabalu High Court under Originating Summons No. BKI-24-13-1-2022 as early as 20 January 2022 instead of filing leave for judicial review. The applicant contended that the complainant and the DB have taken the position that the ruling was not a "final decision" and was therefore not subject to any appeal. This position was only taken on 3 and 21 February 2022, respectively. Still as at those dates, the appeal continues to exist and no leave for judicial review being filed.

**[45]** This court takes judicial notice of the proceeding in BKI-24-13-1-2022 on 28 February 2022 where the applicant had taken the position that there are merits in the appeal and would like to maintain the appeal. The issue that the decision is non-appealable was also recorded and the direction was given for parties to file and serve further affidavit by 7 March 2022 and direction as to the filing and exchange of submission. His Lordship upon hearing the appeal had even fixed date for the ruling on 15 May 2022. Then, on 14 April 2022, the applicant wrote a letter requesting the learned judge to recuse himself from further conduct of the appeal.

**[46]** The applicant submits that there would not be risk of inconsistent verdicts being reached, because the appeal has not yet been heard on its merits. Once the ruling is determined to be invalid, it would be set aside, and there would be nothing to be appealed against in the appeal. There will be no inconsistent rulings. Secondly, the applicant repeats the undertaking above to withdraw the appeal. Therefore, no party will be vexed more than once.

**[47]** By filing the leave application for judicial review under OS BKI-25-12-4-2022 on 18 April 2022 after His Lordship recusing himself and that the appeal under OS BKI-24-13-1-2022 is still pending before the High Court, is clear a duplicity of proceedings and abuse of process of court.

**[48]** This, as pointed by the DB, the prayer in the appeal OS BKI-24-13-1-2022 shows that:

Prayer (a) of the Earlier OS is:

> That the ruling dated 8 December made by the Sabah Advocates Disciplinary Board in Complaint No. DB.2020.91, which found that the Appellant has a case to answer in the said Complaint, be set aside.

whereas prayer (a)(i) of the OS is:

> A declaration that the purported Ruling dated 8 December 2021 by the Sabah Advocates Disciplinary Board made in Complaint No. DB.2020.91 ("the purported Ruling") is null and void and of no effect.

**[49]** By way of illustration, the DB referred to the decision in *Nazaruddin Mohd Shariff & Anor v. Roslan Maulud & Anor* [2020] 1 LNS 1235 which stated at para. [18]:

> The Court agrees with the Defendants' contention that in view of the undisputed and substantial similarities in the cause of action, *etc*. in respect of …, which also share the same set of facts, the principle of duplicity of proceedings applies to bar the present suit filed by the Plaintiffs. It is clear that the present suit is an abuse of the judicial process …

**[50]** The decision in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53 should also be considered. In that matter, the applicant had filed a notice of appeal to the Special Commissioners against a notice of assessment of tax, and simultaneously filed judicial review proceedings. Low Hop Bing J (as His Lordship was then known) stated at p. 405 (CLJ); para. [30] (MLJ):

> Further, I am also of the view that the concurrent filing of the instant application and applicant's appeal before the Special Commissioners certainly constitutes a duplicity of proceedings and is indeed frivolous, vexatious and an abuse of the process of the court.

**[51]** By virtue of authority in *Nazaruddin* and *Ta Wu Realty Sdn Bhd* referred to above, the relief sought by the applicant in the earlier OS BKI-24-13-1-2022 and in the present OS BKI-25-12-4-2022 is identical in effect, *ie*, setting aside the decision of the DB dated 8 December 2021, hence duplicity of proceedings and an abuse of judicial process. Further, the applicant had taken the position in the earlier OS BKI-24-13-1-2022 that there are merits in the appeal and would like to maintain the appeal.

A **Conclusion**

**[52]** On the preliminary issue whether the Federal AG have *locus standi* to appear, my answer is yes, by virtue of O. 53 r. 3(3) of the ROC 2012, the AGC is entitled as of right to appear in any judicial review application before the court. Learned SFC appears in the capacity as the AG and not for the
B respondent as yet at this leave stage. During the mention date on 19 May 2022, learned SFC had indicated that he will be filing their written submission objecting to the application for leave. Hence no prejudice caused to the applicant.

C **[53]** As for the DB, objection was raised under the heading preliminary issues *via* the filing of AIO. Since the applicant's own prayer (a) in the OS is for leave to "commence a judicial review application against the Sabah Advocates Disciplinary Board" the DB therefore do have the *locus standi* to appear.

D **[54]** Further, issues raised by the AGC and DB objecting the leave application are similar with regard to no respondent being named as required in Form 109 and leave application filed out of time as prescribed in O. 53 r. 3(6) of the ROC 2012.

**[55]** In Form 109, it is applicable for application for leave where the
E applicant requires to state the name of the respondent(s). Failing to state the name of the respondent(s) in the originating application in the nature of Form 109 will be fatal: see *Omar Suhaimi Abu Hassan v. Mahkamah Perusahaan Malaysia & Anor* (*supra*).

F **[56]** Counsel for the applicant has failed to appreciate that Form 109 is to be used in making the leave application for judicial review. Hence, the OS is fundamentally defective as it fails to name any respondent(s).

**[57]** In respect of leave application was filed out of time, it is trite law that an application for judicial review shall be made promptly, within three
G months, as prescribed by O. 53 r. 3(6) of the ROC 2012, which makes the three-month deadline a mandatory requirement.

**[58]** Here, the applicant's leave application filed on 18 April 2022 is clearly filed out of time. This court is of the view the word "shall" in O. 53 r. 3(6) is to be observed strictly. Compliance with the time frame prescribed
H by the rules is fundamental as it goes to jurisdiction. Thus the need for rigid adherence to the express dictates of O. 53 of the ROC 2012. As there was no cogent reason given for the delay, the application for leave ought to be dismissed based on this factor alone.

**[59]** Finally, the relief sought by the applicant in the earlier OS BKI-24-13-
I 1-2022 and in the present OS BKI-25-12-4-2022 is identical in effect, *ie*, setting aside the decision of the DB dated 8 December 2021, hence duplicity

of proceedings and an abuse of judicial process. Further, the applicant had taken the position in the earlier OS BKI-24-13-1-2022 that there are merits in the appeal and would like to maintain the appeal.

**[60]** For the aforesaid reasons, this application for leave to commence judicial review proceedings (encl. 1) is dismissed with costs of RM4,000 to be paid to the AGC and the DB, respectively upon payment of allocator fee.